Supreme Court, U. S.
FILED
APR 22 1977
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States.

OCTOBER TERM, 1976.

No. 76-1292. **76-1062**

WILLIAM L. O'BRIEN ET AL.,
PETITIONERS,
v.
POLICE COMMISSIONER OF THE CITY OF BOSTON,
RESPONDENT.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Brief for the Respondent in Opposition to Petition for Writ of Certiorari.

LAWRENCE J. BALL,
SPECIAL ASSISTANT CORPORATION COUNSEL,

JOHN W. FIELDSTEEL,
3 Center Plaza, Room 630,
Boston, Massachusetts 02108.
(617) 742-1183

ADDISON C. GETCHELL & SON, INC., THE LAWYERS' PRINTER, BOSTON

Table of Contents.

Statement of the case 1

Argument 2

I. The questionnaire does not violate the plaintiffs' constitutional rights because the questionnaire is specifically, directly and narrowly related to the ability and fitness of the plaintiffs to perform their duties as police officers 2

II. The financial questionnaires do not violate the plaintiffs' right of privacy 7

III. The court does not have jurisdiction because the plaintiffs have an adequate administrative and judicial remedy afforded by the Civil Service Laws 8

IV. The procedures used to suspend the plaintiffs did not violate the plaintiffs' due process rights 12

V. The complaint in the present case fails to allege sufficient facts upon which a claim for relief may be granted and is subject to dismissal under Fed. R. Civ. P., Rule 12(b)(6) 14

Conclusion 16

Appendix 17

Table of Authorities Cited.

CASES.

Allee v. Medrano, 416 U.S. 802 (1974) 8

Allen v. Greensboro, North Carolina, 452 F. 2d 489 (4th Cir. 1971) 12

Avins v. Mangum, 450 F. 2d 932 (2d Cir. 1971) 14

Bergeron v. Superintendent, Walter E. Fernald State School, 353 Mass. 331 (1967) 9

Board of Selectmen of Framingham v. Civil Service Commission, Mass. Adv. Sh. (1974) 2389, 321 N.E. 2d 649 6

Bonner v. Circuit Court of St. Louis, Mo., 526 F. 2d 1331 (8th Cir. 1975) cert. denied 96 S. Ct. 1418 (1976) 8-9

Broderick v. Police Commissioner of Boston, Mass. Adv. Sh. (1975) 1838, 330 N.E. 2d 199, cert. denied, 423 U.S. 1048 (1976) 2

Brouillette v. Worcester, Mass. Adv. Sh. (1974) 183, 306 N.E. 2d 252 9

Burks v. Perk, 470 F. 2d 163 (6th Cir. 1972), cert. denied, 412 U.S. 905 (1973) 10

The Coach and Six Restaurants, Inc. v. Public Works Commission, 363 Mass. 643, 296 N.E. 2d 501 (1973) 9

Conley v. Gibson, 355 U.S. 41 (1957) 14, 15

County Commissioners of Middlesex County v. Sheriff of Middlesex County, 361 Mass. 89, 278 N.E. 2d 751 (1972) 9

Cullen v. Mayor of Newton, 308 Mass. 578 (1941) 13

Dwen v. Barry, 483 F. 2d 1126 (2d Cir. 1973) reversed on other grounds sub nom. Kelley v. Johnson, 425 U.S. 238 (1976) 7

East Chop Tennis Club v. Massachusetts Commission Against Discrimination, 364 Mass. 444 (1973) 1611, 305 N.E. 2d 507 9

Fahy v. Commissioner to Investigate Allegations of Police Corruption, 319 N.Y.S. 2d 242 (1971), aff'd with out opinion, 319 N.Y.S. 2d 807 (Appellate Division) aff'd with out opinion, 322 N.Y.S. 2d 73 (Court of Appeals) 5

Fritz v. Gorton, 517 P. 2d 911 (Wash. S. Ct.), appeal dismissed, 417 U.S. 902 (1974) 8

Fuentes v. Roher, 519 F. 2d 379 (2nd Cir. 1975) 10

Gardner v. Broderick, Police Commissioner of New York, 392 U.S. 273 (1968) 3

Garrity v. New Jersey, 385 U.S. 493 (1967) 3

Gibson v. Berryhill, 411 U.S. 564 (1973) 9-10

Gillibeau v. Richmond, 417 F. 2d 426 (9th Cir. 1969) 15

Hahn v. Sargent, 388 F. Supp. 445 (D. Mass. 1975), aff'd 523 F. 2d 461 (1st Cir. 1975), cert. denied, 96 S. Ct. 1495 (March 29, 1976) 16

Hortonville Joint School Dist. No. 1 v. Hortonville Education Ass'n, — U.S. — 96 S. Ct. 2308 (1976) 13

Illinois State Employees Association v. Walker, 57 Ill. 2d 512, 315 N.E. 2d 9 (1974); cert. denied sub nom. Troopers Lodge No. 41 v. Walker, 419 U.S. 1058 (1974) 6, 8

In re Emmons, 63 N.J. Super. 136 (Superior Ct. 1970) 6

Jackson v. Sargent, 394 F. Supp. 162 (D. Mass. 1975) 10-11

Kammerer v. Board of Fire and Police Commissioners of Lombard, 44 Ill. 2d 500, 256 N.E. 2d 12 (1970) 6

Kelley v. Johnson, 425 U.S. 238 (1976) 6

Lyons v. Gilligan, 382 F. Supp. 198 (N.D. Ohio 1974) 14

Mastandrea v. Gurrentz International Corp., 65 F.R.D. 52 (D.C. Pa. 1974) 15, 16

Mellon National Bank & Trust Co. v. Nationwide Mutual Insurance Co., 32 F.R.D. 365 (W.D. Pa. 1962) 16

Muller v. Conlisk, 429 F. 2d 901 (7th Cir. 1970) 7

Needleman v. Bohlen, 386 F. Supp. 741 (D. Mass. 1974) 11
Newport News Shipbuilding & Dry Dock Co. v. Schauffler, 303 U.S. 54 (1938) 14
Paul v. Davis, 424 U.S. 693 (1976) 7
People v. O'Brien, 305 N.Y. 915 (1953) 6
People v. Workman, 308 N.Y. 668 (1954) 6
Police Commissioner of Boston v. Ciccolo, 356 Mass. 555 (1969) 9
Raper v. Lucey, 488 F. 2d 748 (1st Cir. 1973) 10, 11
Seattle Police Officers' Guild v. Seattle, 494 P. 2d 485 (Wash. S. Ct. 1972) 6
Sillifant v. Sheriff, 6 N.Y. 2d 487 (1959) 4-5
Silverio v. Municipal Court of Boston, 355 Mass. 623 (1969) cert. denied 396 U.S. 878 (1969) 3
Soldevila v. Secretary of Agriculture of the United States, 512 F. 2d 427 (1st Cir. 1975) 8
Stein v. Howlett, 52 Ill. 2d 570, 289 N.E. 2d 409 (1972) 6
Stevenson v. Board of Education, 426 F. 2d 1154 (5th Cir.) cert. denied 400 U.S. 957 (1970) 11
Stradley v. Anderson, 478 F. 2d 188 (8th Cir. 1973) 6-7
Uniformed Sanitation Men Assoc., Inc. v. Commissioner of Sanitation of New York, 392 U.S. 280 (1968) 3
Uniformed Sanitation Men Association, Inc. v. Commissioner of Sanitation of New York, 426 F. 2d 619 (2d Cir. 1970) cert. denied 406 U.S. 961 (1972) 3
Withrow v. Larkin, 421 U.S. 35 (1975) 13
Yarbrough v. Jacksonville, 363 F. Supp. 1176 (M.D. Fla. 1973) affirmed 504 F. 2d 759 (5th Cir. 1974) 7

STATUTES.

42 U.S.C. § 1983 8, 10
G.L. c. 30A, § 11(2) 12
G.L. c. 31 9, 11
§ 43 11, 12
§ 43(a) 9, 13
§ 43(b) 9, 11, 12
§ 46A 9
St. 1962, c. 322 12

MISCELLANEOUS.

5 C.F.R. §§ 735.401, 735.407 4
31 C.F.R. §§ 0735-70, 0735-76 4
Fed. R. Civ. P.
Rule 12(b)(6) 14, 15
Rule 23 15
Rule 23(a)(1-4)(b) 15
McCormack, Evidence, § 350, p. 843 12
Wright and Miller, Federal Practice and Procedure, § 1356 (1969) 14

Supreme Court of the United States.

OCTOBER TERM, 1976.

No. 76-1292.

WILLIAM L. O'BRIEN ET AL.,
PETITIONERS,

v.

POLICE COMMISSIONER OF THE CITY OF BOSTON,
RESPONDENT.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Brief for the Respondent in Opposition to Petition for Writ of Certiorari.

Statement of the Case.

The plaintiffs in this action are three Boston Police Officers who were allegedly suspended without pay for one month for failure to obey an order that they complete and return a financial questionnaire. A copy of the financial questionnaire is included in the petition and marked "Appendix C." The plaintiffs seek to bring a class action on behalf of all individuals similarly situated. The complaint prays for a preliminary and permanent injunction against

any action requiring the plaintiffs to complete the questionnaire, a declaratory judgment and a judgment for alleged damages in the sum of one million dollars. The plaintiffs' request for a preliminary injunction was denied by Chief Judge Caffrey.

The defendant moved to dismiss the complaint. That motion was granted by the United States District Court for the District of Massachusetts. The granting of that motion was affirmed by the United States Court of Appeals for the First Circuit.

This memorandum is in opposition to the plaintiffs' Petition for a Writ of Certiorari to that Court of Appeals.

Argument.

I. THE QUESTIONNAIRE DOES NOT VIOLATE THE PLAINTIFFS' CONSTITUTIONAL RIGHTS BECAUSE THE QUESTIONNAIRE IS SPECIFICALLY, DIRECTLY AND NARROWLY RELATED TO THE ABILITY AND FITNESS OF THE PLAINTIFFS TO PERFORM THEIR DUTIES AS POLICE OFFICERS.

The Massachusetts Supreme Judicial Court has specifically upheld the power of the Boston Police Commissioner to order members of the department to complete and return written reports. In *Broderick* v. *Police Commissioner of Boston*, Mass. Adv. Sh. (1975) 1838, 330 N.E. 2d 199, cert. denied, 423 U.S. 1048 (1976), the court reviewed the legality of an order that police officers answer questions relating to off-duty conduct and held that such questions did not violate the plaintiffs' constitutional rights. That power has also been upheld in many other decisions.

Both the Supreme Court of the United States and the Supreme Judicial Court of the Commonwealth have held that a police commissioner may, upon the threat of discharge or suspension, require a police officer to provide

information concerning his alleged misconduct. In *Silverio* v. *Municipal Court of Boston*, 355 Mass. 623, 628 (1969), cert. denied 396 U.S. 878 (1969), the Supreme Judicial Court said:

> "The Supreme Court of the United States in *Gardner* v. *Broderick*, 392 U.S. 273, 278, held that it was improper to discharge a police officer for refusal to waive immunity following his being told that he would be discharged if he did not do so. The court also held, however, that if a policeman 'had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution . . . the privilege against self-incrimination would not have been a bar to his dismissal.' "

The plaintiffs have not alleged in the complaint that the defendant required them to waive their rights under the Fifth Amendment. In fact, in this case, as in *Broderick*, the plaintiffs were informed that their responses could not be used in any criminal proceedings. See *Garrity* v. *New Jersey*, 385 U.S. 493 (1967). In the absence of a requirement that there be such a waiver, it is clear that the suspension of the plaintiffs for failure to answer a questionnaire does not violate plaintiffs' Fifth Amendment rights. *Uniformed Sanitation Men Assoc., Inc.* v. *Commissioner of Sanitation of New York*, 392 U.S. 280, 284-285 (1968), *Gardner* v. *Broderick, Police Commissioner of New York*, 392 U.S. 273, 278 (1968), *Uniformed Sanitation Men Association, Inc.* v. *Commissioner of Sanitation of New York*, 426 F. 2d 619, 626-628 (2d Cir. 1970) cert. denied 406 U.S. 961 (1972).

The use of such a questionnaire is an accepted and well established practice. Personnel in Federal Law Enforce-

ment Agencies are required by federal regulations to submit financial questionnaires, 31 C.F.R. §§ 0735-70 and 0735-76, and 5 C.F.R. §§ 735401 and 735407, copies of which are attached hereto. The overwhelming majority of courts which have considered a challenge to the use of such questionnaires have ruled that public employees may be required to complete and return such questionnaires. For example, in *Sillifant* v. *Sheriff*, 6 N.Y. 2d 487 (1959), the New York Court of Appeals held that a New York City Building Department Inspector was properly convicted of criminal contempt for refusing to fill out a four-page financial questionnaire directed to him by a grand jury. "The questions are simple ones asking for details of the income of relator and members of his household, the names of banks in which he and his family have accounts, the existence of safe deposit boxes, life insurance and other policies, stock brokerage accounts and of his charge accounts, if any. The questionnaire calls also for approximate figures of living and personal expenses and for relator's financial balance sheet" (p. 489). The court stated that, "No one doubts that this grand jury . . . could compel this relator to answer. . ." these questions.

In his concurring opinion Judge Burke stated the principal more emphatically:

> "There is no question that where there is evidence of corruption that the people of the City of New York are entitled to an accounting by their public servants of the public employees' financial assets for the graft or corruption or misfeasance in office by their public servants—• • • Obviously, evidence of possession of financial assets or income in amounts or justified or accountable for by salary and other legitimate origins is a pertinent source of inquiry where the misconduct of a public officer is the subject of probe. • • • The best evidence of financial status would be a completed financial questionnaire, prepared by the public officer" (pp. 490-491).

Judge Burke then added that if questions are too complicated and involved, the employee may attack items on the questionnaire as being oppressive.

A more recent case upholding the use of financial questionnaires is *Fahy* v. *Commission to Investigate Allegations of Police Corruption,* 319 N.Y.S. 2d 242 (1971), aff'd without opinion, 319 N.Y.S. 2d 807 (Appellate Division) and aff'd without opinion 322 N.Y.S. 2d 73 (Court of Appeals). In that action, sergeants in the New York City Police Department sought an order quashing subpoenas requiring the sergeants to produce certain financial information including federal and state tax returns for 1967, 1968 and 1969 and all records of activity for the period from June 1, 1970 through November 5, 1970 including memoranda, books, pads, notebooks and telephone pads. The court quashed the subpoena insofar as the questionnaire included oppressive items seeking the exact amounts expended for the past three years by the employee, his wife, his dependents and for all others in whose behalf expenditures were made for such items as recreation, gas and oil, automobile tires, gifts, hobbies, tobacco and laundry. However, as to the production of tax returns, bank statements and records of brokerage accounts, the court refused to quash the subpoena and held that the question bear a reasonable relation to the purposes for which the Commission was created, namely to investigate allegations of corruption of members of the New York City Police Department.

In addition, several decisions of the Supreme Court of Illinois have upheld the legality of an executive order and a statute that require the filing of financial statements by public employees detailing the finances of the employee and

his immediate family. *Illinois State Employees Association* v. *Walker*, 315 N.E. 2d 9, 57 Ill. 2d 512 (1974); cert. denied sub. nom. *Troopers Lodge No. 41* v. *Walker*, 419 U.S. 1058, 43 U.S.L.W. 3329 (1974); *Stein* v. *Howlett*, 289 N.E. 2d 409, 52 Ill. 2d 570 (1972). In another similar case the Washington Supreme Court upheld a procedure for questioning police officers and requiring police officers to submit to a polygraph examination. *Seattle Police Officers' Guild* v. *Seattle*, 494 P. 2d 485 (Wash. S. Ct. 1972). See also *Kammerer* v. *Board of Fire and Police Commissioners of Lombard*, 256 N.E. 2d 12, 44 Ill. 2d 500 (1970), *In re Emmons*, 63 N.J. Super. 136 (Superior Ct. 1970). To the same effect are *People* v. *O'Brien*, 305 N.Y. 915 (1953), and *People* v. *Workman*, 308 N.Y. 668 (1954), both affirming perjury convictions of public employees who gave false answers to financial questionnaires before a grand jury.

The specialized nature of law enforcement agencies permits the use of financial questionnaires. Courts have recognized the special nature of police work. For example, the United States Supreme Court recently upheld hair regulations as applied to police. *Kelley* v. *Johnson*, 425 U.S. 238 (1976). See also *Board of Selectmen of Framingham* v. *Civil Service Commission*, Mass. Adv. Sh. (1974) 2389, 321 N.E. 2d 649, 655-656.

Federal courts have also recognized the difference between police and other public employees. In *Stradley* v. *Anderson*, 478 F. 2d 188, 190 (8th Cir. 1973), the court stated:

> "Traditionally, the policeman has been a highly trained officer who is entrusted with a responsible and oftentimes dangerous role as a public servant. His work habits on active duty require disciplined conduct, regimentation and frequent strict adherence to regulation and authorized detail. His job is often a delicate and difficult task to lawfully act against those who are

> sometimes unwilling to recognize any rules or ethics. It is essential that a policeman's training be such that he be taught to obey strict disciplinary procedure and rules in order to lend practical assurance that he will follow command and not abuse his awesome authority. As part of this discipline the police department has determined that an officer shall be neat in his appearance. There can be little argument that this requirement constitutes a legitimate departmental interest."

See also, *Dwen* v. *Barry*, 483 F. 2d 1126, 1129 (2d Cir. 1973) reversed on other grounds sub nom. *Kelley* v. *Johnson*, 425 U.S. 238 (1976); *Yarbrough* v. *Jacksonville*, 363 F. Supp. 1176, 1181-1182 (M.D. Fla. 1973) affirmed 504 F. 2d 759 (5th Cir. 1974); *Muller* v. *Conlisk*, 429 F. 2d 901, 904 (7th Cir. 1970).

A review of these cases, as well as the fact that such financial questionnaires are in wide use by federal law enforcement agencies, clearly indicates that the questionnaire is narrowly, specifically and directly related to the duties of the plaintiffs. Therefore, the use of these questionnaires does not violate the plaintiff's rights under the Fifth Amendment.

II. The Financial Questionnaires do Not Violate the Plaintiffs' Right of Privacy.

A recent decision of the United States Supreme Court has held that the right of privacy is limited to "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education." *Paul* v. *Davis*, 424 U.S. 693 (1976). In that case the court held that disclosure of an alleged shoplifter's arrest record did not violate a right of privacy. In addition the Illinois and Washington Supreme Courts have specifically held that a financial disclosure procedure for public employees does

not violate a right of privacy. *Illinois State Employees Association* v. *Walker*, 57 Ill. 2d 512, 315 N.E. 2d 9, 14-17 (1974), *Fritz* v. *Gorton*, 517 P. 2d 911 (Wash. S. Ct.), appeal dismissed for want of substantial federal question, 417 U.S. 902 (1974).

The complaint in this case alleges no disclosure of matters relating to marriage or family. By its nature the questionnaire is "financial." As such it does not intrude upon any area which is protected by a constitutional right of privacy.

III. The Court does Not Have Jurisdiction because the Plaintiffs Have an Adequate Administrative and Judicial Remedy Afforded by the Civil Service Laws.

The suspension of the plaintiffs is appealable to the Civil Service Commission and the state courts. Therefore, this court may not issue an injunction because the plaintiffs have a fair, adequate and unexhausted remedy. In *Soldevila* v. *Secretary of Agriculture of the United States*, 512 F. 2d 427, 430 (1st Cir. 1975), the court stated:

> The strong policy against enjoining incomplete agency actions, which is reinforced by the equity policy against enforcing personal service contracts and the disruptive effect of granting temporary relief in such cases, requires an extraordinarily strong showing of irreparable harm to warrant a preliminary injunction. *Sampson* v. *Murray*, 415 U.S. 61 . . . (1974).

It is a settled rule of equity that a plaintiff who seeks equitable relief must demonstrate that he lacks an adequate remedy at law and that absent injunctive relief he will suffer irreparable harm. *Allee* v. *Medrano*, 416 U.S. 802, 814 (1974). This rule applies in cases where relief is sought under 42 U.S.C. § 1983. *Bonner* v. *Circuit Court of City of St. Louis, Mo.*, 526 F. 2d 1331, 1335-1336 (8th Cir. 1975), cert. denied 96 S.Ct. 1418 (1976).

The plaintiff may not circumvent or supplement the remedies afforded him by G.L. c. 31. Under G.L. c. 31, the plaintiff is afforded three ways of appealing a decision to impose discipline: (1) Request a hearing before the Civil Service Commission pursuant to § 43(*b*); (2) File a complaint with the Commission alleging procedural violations pursuant to the second paragraph of § 46A; or (3) File a complaint in the Supreme Judicial Court or the Superior Court alleging procedural irregularities pursuant to the first paragraph of § 46A. These are the only remedies available to the plaintiff; See *Police Commissioner of Boston* v. *Ciccolo*, 356 Mass. 555 (1969). The Supreme Judicial Court has repeatedly ruled that an employee who has been disciplined is required to follow the statutory scheme and may not file a complaint for an injunction, mandamus or declaratory judgment. *Brouillette* v. *Worcester*, 364 Mass. 444, 447, 306 N.E. 2d 252, 253 (1974); *Bergeron* v. *Superintendent, Walter E. Fernald State School*, 353 Mass. 331 (1967). This doctrine has been uniformly applied in analogous situations in which a plaintiff has an administrative remedy. See *East Chop Tennis Club* v. *Massachusetts Commission Against Discrimination*, Mass. Adv. Sh. (1973) 1611, 305 N.E. 2d 507; *The Coach and Six Restaurants, Inc.* v. *Public Works Commission*, 363 Mass. 643, 296 N.E. 2d 501 (1973); *County Commissioners of Middlesex County* v. *Sheriff of Middlesex County*, 361 Mass. 89, 278 N.E. 2d 751 (1972).

The Supreme Court in *Gibson* v. *Berryhill*, 411 U.S. 564, 575 n.14 (1973), recognized the need to deal with the exhaustion doctrine and stated that:

> State administrative remedies have been deemed inadequate by federal courts and hence not subject to

> the exhaustion requirements, on a variety of grounds. Most often this has been because of delay by the agency, *Smith* v. *Illinois Bell Tel. Co.*, 270 U.S. 587 (1926), or because of some doubt as to whether the agency was empowered to grant effective relief, *Union Pac. R. Co.* v. *Board of Comm'rs of Weld County*, 247 U.S. 282 (1918); *McNeese* v. *Board of Education*, 373 U.S. 668 (1963). *Id.*

Other federal cases have held that a plaintiff in a § 1983 action may not seek federal judicial relief until the available and adequate state remedies have been exhausted. *Fuentes* v. *Roher*, 519 F. 2d 379, 386 (2d Cir. 1975). In *Burks* v. *Perk*, 470 F. 2d 163 (6th Cir. 1972), cert. denied 412 U.S. 905 (1973), the court held that a civil servant who had an adequate judicial remedy under state law could not seek federal relief.

The First Circuit has acknowledged that the exhaustion doctrine continues to apply to § 1983 cases. In *Raper* v. *Lucey*, 488 F. 2d 748, 751 n.3 (1st Cir. 1973), the court articulated a ripeness test which recognizes the need for a definitive administrative or institutional determination before a § 1983 action may arise. This test clearly recognizes that all exhaustion requirements cannot be ignored in a § 1983 action. In *Jackson* v. *Sargent*, 394 F. Supp. 162, 172-173 (D. Mass. 1975), the court held that:

> A § 1983 plaintiff must use any 'automatic' state judicial remedy that would entirely avert the harm of which he complains. Under some conditions, moreover, an aggrieved party might be required to use speedy and effective administrative procedures that might avert the harm before it occurs.
> *Id.* quoting *Wishart* v. *McDonald*, 500 F. 2d 1110, 1114 n.4 (1st Cir. 1974).

The ripeness test announced by the First Circuit in *Raper* v. *Lucey, supra,* was applied by the court in *Needleman* v. *Bohlen,* 386 F. Supp. 741, 746 (D. Mass. 1974). The court noted the need to defer to local institutional authority to assure that the action complained of be final within the institution in the sense that it is ripe for adjudication. See also *Stevenson* v. *Board of Education*, 426 F. 2d 1154, 1157 (5th Cir.), cert. denied 400 U.S. 957 (1970). In *Needleman* no hearing was offered to the plaintiff, the administrative action was definite, and the controversy was, therefore, ripe for adjudication.

In the present case the plaintiffs have attempted to "short-circuit" the administrative framework provided for their protection in G.L. c. 31. They are entitled to request the *de novo* hearing before the Civil Service Commission granted by G.L. c. 31, § 43(*b*). The administrative action is not final or definite in the present case, for the findings of the Police Commissioner at the department trial board may be modified or rejected by the Civil Service Commission. The plaintiffs have chosen to interrupt the normal administrative procedure and have proceeded directly to the federal court. The concerns of comity and ripeness militate against the abandonment of an incomplete administrative process and the premature involvement of federal courts in state administrative procedure.

In this case the plaintiffs have a fair and adequate remedy provided by the civil service laws of Massachusetts, G.L. c. 31, §§ 43 et seq. Those remedies are established to protect the statutorily created tenure of public employees. The plaintiffs must allow this administrative framework to articulate a definite result before resorting to the federal courts.

IV. The Procedures Used to Suspend the Plaintiffs did Not Violate the Plaintiffs' Due Process Rights.

The complaint alleges that the Police Commissioner violated the rights of the plaintiffs by holding a hearing at which he presided and by not applying formal rules of evidence. Such a procedure is, however, required under the Civil Service Statutes of Massachusetts. General Laws, c. 31, § 43, mandates that the first hearing as to a suspension or discharge must be before the "appointing authority." The appointing authority is the person legally empowered to hire and fire. The person who has such power over the plaintiff patrolmen is the defendant Police Commissioner. See St. 1962, c. 322. The Civil Service laws also provide for a "de novo" hearing on appeal before the Civil Service Commission which has the authority to order the reinstatement of the employee "without loss of compensation." G.L. c. 31, § 43(*b*). Such a review procedure clearly complies with due process.

There is no requirement that formal rules of evidence apply at the administrative civil service hearings. The Administrative Procedures Act of Massachusetts recognized that formal rules of evidence should not apply to administrative agency hearings. That law, G.L. c. 30A, § 11(2), provides that "agencies need not observe the rules of evidence observed by courts." See also McCormack, *Evidence*, § 350, p. 843. The requirements of due process is that the hearing be "fair" and not that all of the machinery of a criminal trial be incorporated in the hearing. *Allen* v. *Greensboro, North Carolina*, 452 F. 2d 489 (4th Cir. 1971). In this case, there can be no showing that the hearings were not fair.

In addition, the United States Supreme Court has held that there is no violation of due process where a public

agency combines both the investigation and adjudicative function, *Withrow* v. *Larkin*, 421 U.S. 35 (1975). See generally *Hortonville Joint School Dist. No. 1* v. *Hortonville Education Ass'n*, 426 U.S. 482 (1976).

The complaint fails to allege any specific bias toward the individual plaintiffs, but merely alleges in effect that the Police Commissioner, because of the duties of his office, violated the plaintiffs' due process right by conducting the civil service hearing. That is not a situation involving a "Biased decisionmaker" referred to in *Withrow* at p. 47. The Police Commissioner is compelled by law to administer the Boston Police Department and to conduct civil service hearings. General Laws, c. 31, § 43(*a*) provides that civil service hearings must be held before the "appointing authority." The definition of "appointing authority," in G.L. c. 31, § 1, is that officer who has the power to hire and fire. Therefore, the Police Commissioner, by virtue of St. 1962, c. 322, is the only person who is the appointing authority. Failure to conduct the hearing before the Police Commissioner may render a disciplinary action null and void. See *Cullen* v. *Mayor of Newton*, 308 Mass. 578, 582-583 (1941). In addition, all department rules and guidelines are "orders" of the police commissioner. Therefore, a decision from this court which precludes the Police Commissioner from conducting hearings will, in effect, prevent the imposition of any discipline for violation of rules or guidelines for the Boston Police Department as well as for all of the Departments, and all of the State and Local governments. Clearly, the procedure followed by the Police Commissioner is not a violation of due process.

V. The Complaint in the Present Case Fails to Allege Sufficient Facts upon Which a Claim for Relief may be Granted and is Subject to Dismissal under Fed. R. Civ. P., Rule 12 (b)(6).

The motion to dismiss for failure to state a cause of action, Fed. R. Civ. P., Rule 12(b)(6), calls upon the court to separate legal conclusions from well-pleaded facts in evaluating the plaintiff's complaint. While the court is bound to accept as true all well-pleaded facts, it is clear that the court may refuse to accept legal conclusions, unsupported conclusions, unwarranted inferences and deductions, or sweeping legal conclusions cast in the form of factual allegations. Wright and Miller, *Federal Practice and Procedure*, § 1356, at pp. 594-596 (1969). Although well-pleaded facts are deemed admitted for the testing of the complaint's sufficiency, such an admission does not include legal conclusions drawn from these facts. *Newport News Shipbuilding & Dry Dock Co.* v. *Schauffler*, 303 U.S. 54, 57 (1938). Where a complaint is entirely conclusory and alleges no facts upon which a court could find a denial of constitutional rights, a motion to dismiss filed pursuant to Fed. R. Civ. P., Rule 12(b)(6) should be granted. *Avins* v. *Mangum*, 450 F. 2d 932, 933 (2d Cir. 1971).

The plaintiffs strongly rely on language in the case of *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957). The opinion in *Conley* states that a complaint may not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief. Although this rule may apply in some cases, it has recently been distinguished in a case quite similar to the case at bar. In *Lyons* v. *Gilligan*, 382 F. Supp. 198 (N.D. Ohio 1974), the court considered the plaintiff's reliance on the language in *Conley* but held the rule not

to be applicable and dismissed the case. The *Lyons* court was faced with a complaint which alleged the denial of the Constitutional right to privacy and the imposition of cruel and unusual punishment in violation of the Eighth Amendment. The defendants moved for a dismissal pursuant to Rule 12(b)(6) of the Fed. R. Civ. P. The plaintiffs contended that no dismissal should be granted due to the rule in the *Conley* case. The court granted the motion to dismiss and answered the plaintiffs' contention in the following statement:

> Because these claims turn on constitutional considerations that may be fully tested in light of the facts alleged in the complaint and accepted as true for the purpose of considering the defendant's motion to dismiss, it is concluded that this case does not fall within that rule. *Lyons, Id.*, at p. 199.

The plaintiffs also cite *Gillibeau* v. *Richmond*, 417 F. 2d 426, 430 (9th Cir. 1969), as standing for the proposition that a dismissal may only be granted in a civil rights suit if the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. The facts of the *Gillibeau* case distinguish it from the case at bar. In *Gillibeau*, the defendants were challenging the plaintiff's ability to comply with the rule governing class actions [Fed. R. Civ. P., Rules 23, 23(a)(1-4)(b)]. *Id.*, at p. 432. The allegations in the complaint involved complex issues of conspiracy, unreasonable search and seizure, and interference with the right to assemble. The case at bar involves no such complex factual allegations. The holding in *Gillibeau* was further refined by the court in *Mastandrea* v. *Gurrentz International Corp.*, 65 F.R.D. 52 (D. Pa. 1974). The opinion in *Mastandrea* referred to the *Gillibeau* case but added that, "if allegations in

complaint, taken as true do not effectively state a claim, added assertion by the plaintiff that they do state a claim will not save complaint." *Id.*, at p. 54.

A motion to dismiss will be granted where it is clear that, even if the facts alleged in the complaint are true, there is no deprivation of a Constitutional right. *Hahn* v. *Sargent,* 388 F. Supp. 445, 450 (D. Mass. 1975); aff'd 523 F. 2d 461 (1st Cir. 1975) cert. denied, 96 S. Ct. 1495 (March 29, 1976). This is particularly true where the law does not support the plaintiff's case and clearly points in favor of the defendant's case. *Mellon National Bank & Trust Co.* v. *Nationwide Mutual Insurance Co.*, 32 F.R.D. 365, 366 (W.D. Pa. 1962).

Conclusion.

For the above stated reasons, the Petition should be denied.

Respectfully submitted,

POLICE COMMISSIONER
OF THE CITY OF BOSTON,
LAWRENCE J. BALL,
Special Assistant Corporation
Counsel,
JOHN W. FIELDSTEEL,
3 Center Plaza, Room 630,
Boston, Massachusetts 02108.
(617) 742-1183

Appendix.

CODE OF FEDERAL REGULATIONS.

Title 31—Money and Finance: Treasury.

STATEMENT OF EMPLOYMENT AND FINANCIAL INTERESTS.

§ 0.735-70 Employees required to submit statements.

Except as provided in § 0.735-71 statements of employment and financial interests will be filed by the following employees:

(a) Those paid at a level of the Executive Schedule in Subchapter II of Chapter 53 of Title 5, United States Code.

(b) Those classified at GS-13 or above under 5 U.S.C. 5332, or at a comparable pay level under another authority, who are in positions, specifically identified in Appendix A to this part, the incumbents of which are responsible for making a Government decision or taking a Government action in regard to:

(1) Contracting or procurement;

(2) Administering or monitoring grants or subsidies;

(3) Regulating or auditing private or other non-Federal enterprise; or

(4) Other activities where the decision or action has an economic impact on the interests of any non-Federal enterprise.

(c) Those classified at GS-13 or above under 5 U.S.C. 5332, or at a comparable pay level under another authority, who are in positions, specifically identified in Appendix A to this part, which the Secretary of the Treasury has determined have duties and responsibilities which require the incumbent to report employment and financial interests in order to avoid involvement in a possible conflicts-of-interest

situation and carry out the purpose of law, Executive order, 5 CFR Part 735, and this part.

(d) Those classified below GS-13 under 5 U.S.C. 5332, or at a comparable pay level under other authority, who are in positions which otherwise meet the criteria in paragraphs (b) and (c) of this section, but only when the inclusion of the positions in Appendix A to this part has been specifically justified by the Secretary of the Treasury in writing to the Civil Service Commission as an exception that is essential to protect the integrity of the Government and avoid employee involvement in a possible conflicts-of-interest situation.

(e) Alterations to, deletions from, and other amendments of the list of positions in Appendix A to this part may be made under the criteria in paragraphs (b) through (d) of this section and are effective upon approval by the Secretary of the Treasury and actual notification to the incumbents. Amendments to the list in Appendix A of this part shall be submitted annually for publication in the FEDERAL REGISTER.

§ 0.735-76 Interests of employees' relatives.

For purposes of completing the statements of employment and financial interests, the interest of a spouse, minor child, or other member of the employee's immediate household is to be considered an interest of the employee. In other words, those blood relations who are residents of the employee's household are to be treated for purposes of completing the financial statement as though they were the employee and therefore, the report of financial statements should reflect their employment and financial interests in the same manner that the employment and financial interests of the employee are shown.

Title 5—Administrative Personnel.

Subpart D—Agency Regulations Governing Statements of Employment and Financial Interests

§ 735.401 Form and content of statements.

The statements of employment and financial interests required under this subpart for use by employees and special Government employees shall contain, as a minimum, the information required by the formats prescribed by the Commission in the Federal Personnel Manual. An agency shall not include questions on a statement of employment and financial interests that go beyond, or are in greater detail than, those included on the Commission's formats without the approval of the Commission.

§ 735.407 Interests of employees' relatives.

The interest of a spouse, minor child, or other member of an employee's immediate household is considered to be an interest of the employee. For the purpose of this section, "member of an employee's immediate household" means those blood relations who are residents of the employee's household.